WISCONSIN LEGISLATIVE COUNCIL

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TO: ASSEMBLY COMMITTEE ON ENERGY AND UTILITIES
SENATE COMMITTEE ON COMMERCE, UTILITIES, AND RAIL

FROM: David L. Lovell, Senior Analyst, and John Stolzenberg, Chief of Research Services

RE: 2007 Assembly Bill 207 and 2007 Senate Bill 107, Relating to Regulation of Cable Television and Video Service Providers; Background and Summary

DATE: March 26, 2007

This memorandum summarizes the provisions of 2007 Assembly Bill 207 and 2007 Senate Bill 107, relating to regulation of cable television and video service providers. The memorandum includes summaries of applicable current law. It was prepared at the request of Representative Phil Montgomery, Chair, Assembly Committee on Energy and Utilities, and Senator Jeff Plale, Chair, Senate Committee on Commerce, Utilities, and Rail.

OVERVIEW AND PURPOSE

The bills replace municipal franchising of cable television service with a streamlined state franchising process for video services offered by cable service providers and telecommunications service providers. In legislative findings contained in the bills, the purposes of the legislation is summarized in the following statement:

> This section is an enactment of statewide concern for the purpose of providing uniform regulation of video service that promotes investment in communications and video infrastructures in the continued development of the state's video service marketplace within a framework that is fair and equitable to all providers. [Proposed s. 66.0420 (1) (h).]

In general, the bills simplify the process for a video service provider to obtain a franchise to offer its service in this state and reduces the state's and municipalities' roles in regulating those services. The bills seek to facilitate the entry of new providers and thereby foster the development of competitive markets for video services. The bills anticipate that the resulting competition will effectively regulate the behavior of video service providers in such areas as rates, services, and customer satisfaction, as providers compete to attract and retain customers.

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LEGISLATIVE FINDINGS

Current state law contains a statement of legislative findings and intent. This statement reflects the Legislature's delegation to municipalities of the authority to regulate and impose franchise fees on cable operators under the Federal Cable Communications Policy Act of 1984.

The bills replace the current statement of legislative findings and intent with eight legislative findings relating to the purposes of the state video franchising framework created by the bills, described above.

AUTHORITY TO PROVIDE VIDEO SERVICE

Current Law

Cable Service Providers

Under federal law, a franchise is required to provide cable service. [47 USC 521 *et seq.*] The franchising authority, the entity that grants a franchise, may be either the state or an individual municipality. Under state law, municipalities (cities, villages, and towns) are the franchising authority. Municipalities may operate or regulate cable television systems, require the payment of franchise fees by cable operators, and set rates and regulate cable services to the extent allowed by federal law. [s. 66.0419 (3), Stats.]

Telecommunications Providers

Federal law is not entirely clear regarding the provision of video services by a telecommunications provider. On the one hand, the service has the attributes of cable service, suggesting that it should be subject to cable franchising requirements. On the other hand, since the service is provided by a regulated telecommunications utility using its telecommunications facilities, one could argue that it is a telecommunications service, subject to regulation as such but not subject to cable regulations. AT&T argues, based on the configuration of its network, that its video service is neither a cable service subject to regulation under cable service regulations, nor a telecommunication service subject to telecommunications regulations. This regulatory uncertainty is illustrated in diverging strategies being pursued by telecommunications companies: AT&T is installing facilities for video service in various cities, asserting that it has the authority to do so, while Verizon is negotiating cable franchise agreements with other cities. The City of Milwaukee has disputed AT&T's assertions and has asked the US District Court to rule whether AT&T is subject to the city's cable franchising ordinance. While a ruling from the court could greatly clarify the regulatory scene, it could take years before appeals are completed. In the meantime, the City of Milwaukee and AT&T have negotiated a draft, three-year, interim agreement to govern AT&T's development of video service in that city, pending the outcome of the federal court case.

The Bills

In General

The bills apply to "video programming" and "video service" provided by "video service providers." "Video programming" is defined as "programming provided by, or generally considered comparable to programming provided by, a television broadcast station." "Video service" is defined, effectively, as video programming provided by a cable service provider or a telecommunications service provider through wireline-based facilities.[1] "Video service" does ***not*** include video programming provided by cellular telephone, satellite, television, or Internet access. A "video service provider" is any person that holds a state video franchise.

The bills specify that the state is the exclusive franchising authority for video service providers in Wisconsin. They phase out existing municipal franchise agreements by prohibiting their renewal and allowing cable operators to terminate them prior to their expiration. They further prohibit municipalities from requiring video service providers to obtain new municipal franchises. In their place, the bills require video service providers to obtain a state franchise, which applies state-wide and does not expire unless terminated by the franchise holder. An incumbent cable operator may choose to continue operating under an existing municipal franchise for the remaining life of that franchise; the bills refer to these as "interim cable operators."[2]

Application for Franchise

A person who intends to provide video service in this state must apply to the Department of Financial Institutions (DFI) for a franchise. In general, the application must identify the applicant, the areas in which it intends to provide video service (its "video franchise area"), and the date on which the applicant intends to commence service. It must also include an affidavit with assurances that the applicant will comply with filing requirements of the Federal Communications Commission (FCC) and with all applicable state and federal laws, and that the applicant is legally, financially, and technically qualified to provide the service. Within 10 business days of receiving an application, the DFI must notify the applicant whether the application is complete. Within 10 business days of receiving an application that it determines is complete, the DFI must issue a franchise to the applicant. If the DFI fails to issue the franchise in the required time, it will be considered to have issued the franchise.

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[1] The definition of "video service" is in several parts. First, it is provided by one of the following: (1) any video programming service (which is not defined); (2) a cable service; or (3) an "open video system," (a video service offered by a local telephone service provider under a specified federal regulatory regime). Second, it is provided through facilities located at least in part in public rights-of-way. Third, the definition is without regard to technology (except for the specification that it be facilities-based). It explicitly ***includes*** services provided using Internet protocol (IP) technology. It explicitly ***excludes*** video programming provided by cell phone service providers or through Internet access (i.e., video clips available on the Internet). The requirement of facilities in public rights-of-way effectively excludes satellite and television broadcast services, as well.

[2] Because an interim cable operator does not hold a state franchise, it is not included in the term "video service provider." Consequently, provisions of the bills that refer only to video service providers do not apply to interim cable operators.

A video service provider must provide an update of information in its application to the DFI within 10 business days of any change to that information. If the change involves an expansion of its video franchise area, the video service provider must inform the DFI of the change as soon as practicable after determining to make the change, but no less than 10 business days before commencing service in the expanded area.

Note that there is no negotiation of terms of a franchise and no review process for an application, beyond the DFI's determination that the application is complete. Rather, under the bills, the terms of a franchise are spelled out in the statutes, as described below.

Transfer of Franchise

Under state law, a cable operator my not transfer a franchise without the approval of the municipality that issued the franchise, although the municipality may not withhold approval without cause. A transfer of control is presumed to occur if 40% or more of the ownership interest in a cable television system is transferred. In addition, a cable operator is required to notify the municipality if it transfers 10% or more of the ownership. A municipality and cable operator can agree to alternative provisions regarding franchise transfers, as part of the written franchise. [s. 66.0419 (5), Stats.]

Under the bills, a video service provider may transfer its franchise to any successor-in-interest. It must inform the DFI of the transfer not later than 10 days after the transfer is complete. The new video service provider must provide to the DFI the information required in a franchise application, but the bills do not specify a time frame for this requirement. Neither the DFI nor any municipality has authority to review or approve a transfer of a franchise.

Notices* to *Municipalities

Under the bills, an applicant for a state franchise must provide a copy of its application to each municipality in its video franchise area at the time that it submits the application to the DFI. Similarly, a video service provider must provide copies of any application information updates (including expansions of video franchise area) to the municipalities and provide municipalities information related to the transfer of a franchise.

A video service provider must provide a municipality notice 10 days prior to commencing service in the municipality.

Notices* by *Municipalities

If a municipality that has a cable franchise agreement in effect on the effective date of the law receives a notice that a video service provider will commence providing service within its territory, the municipality must provide a written notice to the video service provider, within 10 business days of receiving the notice, stating the following: (1) the number of public, educational, or governmental channels the incumbent cable operator is required to provide in the municipality; and (2) the "percentage of revenues" that the incumbent cable operator is required to pay the municipality as franchise fees. The same requirement applies when a municipality receives notice that a video service provider has expanded its video service area to include the municipality.

VIDEO SERVICE PROVIDER FEE

Current Law

Under current law, a municipality may require a cable operator to pay a franchise fee to the municipality. Federal law limits the amount of the fee to not more than 5% of the cable operator's gross revenues, but does not define "gross revenues." It also states that a cable operator may itemize on customers' bills the amount billed to recover the franchise fee. [47 USC s. 542 and s. 66.0419 (3) (c). Stats.]

With few exceptions, franchise fees in Wisconsin are 5% of the cable provider's gross revenues.

The Bills

Imposition and Amount of Fee

The bills require that video service providers make quarterly payments to the municipalities in which they provide service equal to not more than 5% of the provider's gross receipts for that quarter. If, on the effective date of the law, a cable operator is paying a franchise fee that is less than 5% of gross receipts, the new fee will be that lower percentage; if more than one cable operator are providing cable service in a municipality and are all paying fees less than 5%, the new fee is the lowest of those fees. The bills provide a detailed definition of "gross receipts."[3]

Fee payments are due no later than 45 days after the close of a calendar quarter. In general, the video service provider's obligation to pay the fee commences in the quarter in which it commences service. If a municipality fails to notify the video service provider of the percentage of franchise fees and number of public, educational, and government (PEG) channels required under prior cable franchise agreements within the 10-day deadline set by the bills, described earlier, the video service provider's obligation commences in the quarter that includes the 45th day after the municipality provides that notice.

In a number of provisions, the bills prohibit a municipality from imposing any fee or charge on a video service provider beyond the video service provider fee.

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[3]In the bills, "gross receipts" means all revenues received by a video service provider from subscribers in a municipality for video service. It explicitly ***includes***: recurring charges for video service; event-based charges (e.g., pay-per-view); equipment rental (e.g., set top boxes); service charges (for, e.g., activation, installation, repair, and maintenance); and administrative charges. It explicitly ***excludes***: discounts, refunds, and other price adjustments; uncollectible fees (those written off as bad debt but later collected are included, less the expense of collection); late payment charges; maintenance charges; amounts billed to recover taxes, fees, surcharges, or assessments; revenue from the sale of certain capital assets or surplus equipment; charges for non-video services that are bundled with video services; and reimbursement by programmers of marketing costs actually incurred by the video service provider. Implicitly ***excluded*** are revenues a video service provider receives from anyone other than a subscriber, most notably revenues from advertising and home shopping channels.

Enforcement of Fee and Other Provisions

The bills allow a municipality to review a video service provider's records to ensure proper and accurate payment of the fee, but limit this review to no more than once in any three-year period. The parties must complete good-faith settlement discussions regarding any dispute regarding the amount of a fee before either party may bring an action regarding the disputed fee. In any subsequent litigation, these negotiations will be treated as compromise negotiations under the state courts' rules of evidence.[4] Unless the parties agree otherwise, any action that is brought must be commenced within three years of the quarter to which the disputed amount relates. Neither party may recover the costs it incurs in the course of such litigation.

The bills require that all determinations and calculations regarding video service provider fees be made using generally accepted accounting practices. Also, the bills specifically allow video service providers to itemize on customers' bills the amount billed to recover the fee.

PEG CHANNELS

Current Law

Under federal law, a municipality may require that a cable operator provide capacity, facilities, or financial support for adequate PEG channel access. It also states that a cable operator may itemize on customers' bills the amount billed to recover the cost of meeting its obligations regarding PEG channels. [47 USC s. 541 (a) (4) (B).]

With few exceptions, current franchise agreements in Wisconsin require provision for two or three PEG channels.

The Bills

Requirement; Number of PEG Channels

The bills require a video service provider to make available to a municipality in which it provides service channels for PEG programming. In general, for a municipality with a population of 50,000 or more, a provider must provide three PEG channels and, for a municipality with a population less than 50,000, it must provide two PEG channels. There are two exceptions to this generalization:

- If, prior to the enactment of the new law, a municipality were receiving fewer PEG channels than these numbers, the future obligation to these municipalities would be no more than that lesser number. For example, if a municipality receives only one PEG channel from its incumbent cable operator, future video service providers will not be obligated to provide more than one PEG channel to that municipality.

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[4] The effect is that any settlement offer made during the negotiations may not be used as evidence that the dispute over the fee is valid or as evidence regarding the amount of the disputed fee.

- If a video service provider distributes programming to more than one municipality from a single head end or hub office, it is required to provide the number of PEG channels to those municipalities collectively corresponding to their collective population. For example, if two municipalities with a collective population of 60,000 are served from a single hub office, the video service provider is required to provide three PEG channels to those municipalities collectively.

In a municipality where there is no incumbent cable operator, the video service provider must make the PEG channels available beginning on the date that it commences service in the municipality. If there is an incumbent cable operator, and the municipality is therefore required to notify the video service provider of the number of PEG channels the incumbent provides to it, the video service provider must make the PEG channels available on the date that it commences service in the municipality or the 90th day after it receives the notice, whichever is later.

If a municipality does not substantially utilize a PEG channel, the video service provider may reprogram that channel. A municipality is substantially utilizing a channel if it provides at least 12 hours of programming on the channel every day, at least 80% of which is new ("not repeated"), locally produced programming. A municipality may regain the use of a PEG channel that has been reprogrammed by certifying to the video service provider that it will substantially utilize the channel.

A video service provider must make PEG channels available on any service tier that is viewed by more than 50% of its customers. If a PEG channel was reprogrammed due to the failure of the municipality to substantially utilize the channel and later restored to a PEG function, the video service provider may provide the restored channel on any service tier.

Operation of PEG Channels

The bills provide that municipalities are responsible for virtually all aspects of operating PEG channels. A video service provider is required to: (1) provide only the first 200 feet of transmission line needed to connect its network to one distribution point used by the municipality to transmit PEG programming for the PEG channel; and (2) transmit programming provided to it by the municipality.

Beyond this, municipalities may not require a video service provider to provide any funds, services, programming, facilities, or equipment related to PEG channel operation. It is the municipality's responsibility to do all of the following:

- Operate the channel and produce or obtain the programming.

- Ensure that all programming is submitted to the video service provider in a form the video service provider can broadcast with no manipulation or modification.

- Make all programming for a PEG channel available to all video service providers operating in the municipality in a nondiscriminatory manner.

Interconnection of Video Service Providers' Networks

The bills require that, if there are more than one video service provider in a municipality and the interconnection of their networks "is technically necessary and feasible for the transmission of programming of any PEG channel," the two providers must negotiate in good faith for interconnection on mutually acceptable terms, rates, and conditions. The provider who requests interconnection is responsible for interconnection costs, including the cost of transmitting programming from its origination point to the interconnection point.

PUBLIC RIGHTS-OF-WAY

Current Law

Cable Service Providers

Federal law provides that a cable franchise "shall be construed to authorize the construction of a cable system over public rights-of-way ...." In exercising this authority, the law requires cable operators to: (1) protect the safety, functioning, and appearance of the property and the safety of the public; (2) bear the cost of the construction; and (3) compensate the land owner for any resulting damages. [47 USC s. 541 (a) (2).]

Telecommunications Providers

State law allows public utilities and various other entities to construct necessary facilities in, across, or beneath streets and highways. Section 66.0425, Stats., establishes the requirement that a person obtain a municipal permit for the privilege to engage in construction in public rights-of-way, and addresses compensation to the municipality, performance bonds, liability, and third parties' interests. Many of the requirements of this section do ***not*** apply to various types of telecommunications companies.

The authority for public utilities and cooperatives that provide a utility service to occupy public rights-of-way is subject to a number of statutes and to "reasonable regulations made by any city, village or town through which the transmission lines or system may pass ...." [s. 182.017, Stats.] Further, a municipality may determine, by contract, ordinance, or resolution and consistent with state law, the "terms and conditions ... upon which [a] public utility may be permitted to occupy the streets, highways or other public places within the municipality." [s. 196.58 (1) (a), Stats.] The Public Service Commission (PSC) is required to review complaints that such regulations are unreasonable, and has adopted rules setting limits on them. [s. 196.58 (4), Stats., and ch. PSC 130, Wis. Adm. Code]

The Bills

The bills provide that, notwithstanding s. 66.0425, municipalities may not impose any fee or requirement on a video service provider relating to the construction of a video service network. They also state that, as long as a video service provider pays the required video service provider fee, "the municipality may not require the video service provider to pay any compensation under s. 66.0425, or

any permit fee, encroachment fee, degradation fee, or any other fee, for the occupation of or work within public rights-of-way."[5]

In a separate provision, the bills state that "[a] video franchise issued by the [DFI] authorizes a video service provider to occupy the public rights-of-way and to construct, operate, maintain, and repair a video service network to provide video service in the video franchise area."

CONSUMER PROTECTION

There is no generally accepted definition of regulations and policies that constitute "consumer protection." For purposes of this memorandum, consumer protection regulations will be considered regulations that are designed to ensure that a business treats its customers fairly. These regulations include:

- Service standards, such as acceptable response times for addressing outages and establishment of a billing dispute resolution process.
- Required disclosure of the terms of product and service offerings and prices.
- Protection of customer privacy.

Current Law

The FCC's regulations require each cable operator to meet the following "***customer service obligations***:" (1) provide a telephone access line, a customer service center, and bill payment locations that meet specified requirements; (2) meet specified performance standards for performing installations and responding to outages and service calls; and (3) issue refund checks and service credits within specified periods. [47 CFR s. 76.309.] The FCC also requires a cable operator to respond to a written complaint over a billing dispute within 30 days and provide certain disclosures to its customers. [47 CFR ss. 76.1602, 76.1603, and 76.1619.] These regulations also authorize a cable franchise authority to enforce the standards and disclosures. In addition, federal law establishes that it does not preclude any state or franchising authority from enacting or enforcing any consumer protection law, to the extent not specifically preempted by federal law, or from imposing additional service standards or disclosure requirements. [47 USC s. 552 (d).]

Current federal law also prohibits a cable operator from collecting or disclosing subscribers' personally identifiable information without consent, except under specified circumstances. [47 USC s. 551.] Cable operators must notify their subscribers at least annually of subscribers' personally identifiable information that the operator is or will be collecting and the uses of this information; provide subscribers access to their personally identifying information; and destroy this information when it is no longer necessary for the purpose for which it was collected. This federal law also specifies that it does not prohibit any state or franchising authority from enacting or enforcing laws consistent with its subscriber privacy protections.

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[5] While the bills clearly indicate that this policy is notwithstanding s. 66.0425, they are silent regarding how these provisions relate to ss. 182.017 and 196.58.

Current state law prescribes a set of "cable subscriber rights." [s. 100.209, Stats.] These standards require a cable operator to: (1) give a subscriber specified credits for service interruptions; (2) prevent disconnection of cable service for failure to pay a bill until the unpaid bill is at least 45 days past due; and (3) specify time periods for a cable operator to repair cable service and to provide notice for instituting a rate increase, deleting a program service, or disconnecting a subscriber. This statute also explicitly states that it does not prohibit the Department of Agriculture, Trade, and Consumer Protection (DATCP) or a municipality from establishing by rule or ordinance, respectively, regulations that expand these subscriber rights.

DATCP's current rule on telecommunications and cable television services specifies certain service standards, including a prohibition on a cable operator billing a consumer for a service that the consumer has not affirmatively ordered (also referred to as "negative option billing") and various prohibited practices, including misrepresenting the provider's identity or the terms of a subscription, or charging a cancellation fee that has not been disclosed to the customer. [ss. ATCP 123.06, 123.08, and 123.10, Wis. Adm. Code.]

DATCP's rules also specify a number of disclosures that a cable operator or telecommunications provider must provide to its subscribers, including information on subscription terms and notice of price increases and other subscription changes. [ss. ATCP 123.02 and 123.04, Wis. Adm. Code.]

DATCP's service standards and disclosure requirements apply to cable operators and to telecommunications providers offering a video programming service bundled with a telecommunications service at a single price.

Staff at the PSC have indicated that the portion of the PSC's rules on telecommunications services standards and disclosure requirements that relate to billing and credit practices apply to a video programming service provided by a telecommunications utility, if the telecommunications utility bundles the video programming service with a telecommunications service and bills for the services on one bill. These standards include (subject to confirmation by PSC staff) bill adjustments and refunds for interrupted service; limits on the ability of the utility to require a cash deposit or other guarantee as a condition to service; criteria for disconnecting or refusing service; and limitations on residential deferred payment agreements. [ss. PSC 165.05 (2) and 165.051 to 165.053, Wis. Adm. Code.]

Current state law specifies a number of privacy protections for cable television subscribers. [s. 134.43, Stats.] These provisions authorize a subscriber to request a device, at no charge to the subscriber, which the subscriber can use to prevent reception and transmission of messages by the subscriber's cable equipment. The provisions also generally prohibit any person from doing any of the following without the written consent of the subscriber within the preceding two years:

- Monitor the subscriber's cable equipment or its use.

- Provide anyone the name, address, or other information that discloses any aspect of the behavior of a subscriber or a member of the subscriber's household, other than for certain billing purposes or providing listings of cable television programs.

- Conduct research that requires the response of the subscriber or a member of the subscriber's household without the specified more frequent notification.

The Bills

The bills establish that, if there is only one video service provider in a municipality, the municipality may require a video service provider to comply with the FCC's "customer service obligations" identified above. The bills preclude the DFI and municipalities from imposing additional or different customer service standards that are specific to the provision of video service.

If there is more than one video service provider in a municipality or if a sole provider is subject to "effective competition," as defined in federal regulations, the bills establish that these video service providers may not be subjected to any "customer service standards."[6] The bills provide an exception to this limitation for customer service standards promulgated by rule by DATCP. The effect of this exception is that the DATCP's, but not the PSC's, current service standards and disclosure requirements will apply statewide to cable operators and to telecommunications providers offering bundled video programming and telecommunications services.

The bills do not preclude DATCP from amending its existing service standards to apply to other types of video service providers or, to the extent it has the legal authority to do so, promulgating by rule other service standards or disclosure requirement.

The bills repeal the current law on cable subscriber rights.

The bills do not amend the cable subscriber privacy protections in state law or broaden the applicability of these protections to video service providers and subscribers. The effect is that the protections will continue to apply to interim cable operators (who do not hold a state franchise and thus are not a video provider under the bills). In addition, an argument can be made that under the bills these state protections will continue to apply to customers of other cable operators who hold a state franchise but not to other types of video service providers based on the distinction in federal law between customer service standards and consumer protection law.

The bills also prohibit any municipality from imposing on any video service provider any requirement relating to the provision of video service. This prohibition would include requirements relating to customer privacy.

ACCESS TO SERVICE ("BUILD-OUT")

Current Law

Federal law prohibits a franchising authority from regulating services, facilities, and equipment provided by a cable operator unless the regulation is consistent with the regulations. Federal law authorizes a franchising authority, to the extent related to the establishment and operation of a cable system, to establish requirements for facilities and equipment in its request for proposals for a franchise

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[6] Neither the bills nor the FCC's regulations define the term "customer service standards." However, since the FCC identifies its service standards and disclosure requirements in 47 CFR ss. 76.309, 76.1602, 76.1603, and 76.1619 as "customer service standards," a strong argument can be made that this prohibition in the bills applies to the types of standards and requirements identified in these FCC regulations.

or renewal of a franchise. [47 USC s. 544 (a) and (b).] These requirements can include requirements for construction of facilities that provide access to service, commonly referred to as "build-out" requirements. Federal law also requires a franchising authority in awarding a cable franchise to allow the applicant's cable system a reasonable period of time to become capable of providing cable service to all households in the franchise area. [47 USC s. 541 (a) (4) (A).]

Current state law authorizes a municipality to regulate services provided by a cable operator to the extent provided under federal law. [s. 66.0419 (3) (e), Stats.]

The Bills

The bill's requirements on access to service apply only to a "large telecommunications video service provider" (LTVSP) This type of provider is a video service provider that uses facilities for providing telecommunications service also to provide video service and that has more than 500,000 residential customer access (or telephone) lines in the state. Presently, only AT&T Wisconsin has this many residential access lines.

The bills require a LTVSP to provide access to its video service to the following percentages of households within its residential local exchange service area:

- Not less than 25% no later than three years after the date on which the LTVSP began providing video service under its state franchise.

- Not less than 50% no later than six years after the date on which the LTVSP began providing video service under its state franchise, or no later than two years after at least 30% of households with access to the LTVSP's video service subscribe to the service for six consecutive months, whichever occurs later.

A LTVSP must file an annual report with the DFI regarding its progress in complying with these requirements.

A LTVSP may apply to the DFI for an extension of any time limit specified in these requirements or for a waiver from the requirements. DFI must grant the extension or waiver if the provider demonstrates to the department's satisfaction that the provider has made "substantial and continuous efforts" to comply with the requirements and that the extension or waiver is necessary due to one or more of the following factors: (1) the provider's inability to obtain access to rights-of-way under reasonable terms and conditions; (2) developments and buildings that are not subject to competition because of exclusive service arrangements or are not accessible using reasonable technical solutions under commercially reasonable terms and conditions; (3) natural disasters; and (4) other factors beyond the control of the provider.

A LTVSP may satisfy these requirements through the use of an alternative technology, other than satellite service, that does all the following: (1) offers service, functionality, and content demonstrably similar to that provided through the provider's video service network; and (2) provides access to PEG channels and messages broadcast over the emergency alert system.

The bills also establish that, notwithstanding any of the above provisions, a telecommunications video service provider of any size is not required to provide video service outside its residential local exchange service area, and a video service provider that is an incumbent cable operator is not required to provide video service outside the area in which the operator provided service at the time DFI issued a video service franchise to the operator.

DISCRIMINATION

Current Law

Federal law specifies that a franchising authority in awarding a franchise must ensure that access to cable service is not denied to any group of potential residential cable subscribers because of the income of the residents of the local area in which the group resides. [47 USC s. 541 (a) (3).]

Current state law authorizes a municipality to regulate services provided by a cable operator to the extent provided under federal law. [s. 66.0419 (3) (e), Stats.]

The Bills

The bills establish that no video service provider may deny access to video service to any group of potential residential customers in the provider's video franchise area because of the race or income of the residents in the local area in which the group resides.

The bills specify a defense to an alleged violation of the above prohibition based on income if the video service provider has met either of the following conditions:

- No later than three years after the date on which the provider began providing video service under its state franchise, at least 25% of households with access to the provider's video service are low-income households.

- No later than five years after the date on which the provider began providing video service under its state franchise, at least 30% of households with access to the provider's video service are low-income households.

The bills define a "low-income household" to be any individual or group of individuals living together as one economic unit in a households whose aggregate annual income is not more than $35,000, as identified by the United States Census Bureau as of January 1, 2007.

The bills apply the provisions on extensions and waivers described in the preceding discussion of access to service to the defenses identified above. The bills also apply the provisions on alternative technologies and limitations on geographic service territory specified in the preceding discussion of access to service to the prohibition on discrimination and the related defenses identified above.

REGULATION OF RATES

Current Law

Under state law, municipalities are authorized to establish cable service rates to the extent provided under federal law. [s. 66.0419 (3) (e), Stats.] Current state law also states that "[t]he authority granted under this section to a municipality to operate and regulate a cable television system is in addition to any other power which the municipality has and the authority of a municipality to operate and regulate a cable television system is limited only by the express language of this section." [s. 66.0419 (4), Stats.]

Federal law expresses a preference for competition over regulation of cable service rates, and prohibits rate regulation if the FCC has determined that the market in question is subject to effective competition. In the absence of effective competition, a franchising authority may regulate rates for basic service only, including programming on the cable operator's basic programming tier. All other rates are subject to FCC regulations. [47 USC s. 543.]

The Bills

The bills provide that neither DFI nor a municipality may regulate the rates of a video service provider under a state franchise or an interim cable operator under a municipal franchise if at least two unaffiliated video service providers provide service in a municipality. This limitation applies regardless of whether any provider has sought a determination by the FCC regarding effective competition.

The bills are silent on rate regulation where there is only one video service provider. The result, it appears, is that no state or municipal entity has authority to regulate rates in this instance.

INSTITUTIONAL NETWORKS

The bills provide that, notwithstanding any ordinance or franchise agreement in effect on the effective date of this law, no state agency or municipality may require an interim cable operator or video service provider to provide any institutional network or equivalent capacity on its network. "Institutional network" is defined as a network that connects governmental, educational, and community institutions.

RULE-MAKING LIMITED

In general, a state agency may promulgate rules interpreting the provisions of any statute enforced or administered by it or prescribing forms or procedures in connection with such statutes. [s. 227.11 (2) (a) and (b), Stats.] In addition, many statutes authorize or require agency rule-making.

The bills prohibit the DFI from promulgating rules interpreting or establishing procedures related to its functions under the bills.

ENFORCEMENT

The bills authorize a municipality, interim cable operator, or video service provider that is affected by a failure to comply with the new law created by the bills to bring an action in circuit court. The court is directed to order compliance with the law, but the bills are silent regarding the recovery of damages. No party to a suit may recover its costs of prosecuting or defending the suit.

In addition, the Department of Justice may enforce the provisions of the new law. The bills do not specify penalties for violations of the new law, nor does Ch. 66, Stats., in which the law in numbered. In the absence of any specified penalty, civil violations are punishable by a forfeiture of not more than $200. [s. 939.61 (1), Stats.]

TERMINOLOGY AND CONFORMING AMENDMENTS

The bills change many references throughout the states from "cable service" to "video service" and from "cable operator" to "video service provider." The bills also conform various statutes to the state video service franchising framework created by the bills.

If you have questions regarding 2007 Assembly Bill 207 and 2007 Senate Bill 107 or video services in general, please contact either of us at the Legislative Council staff offices.

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WISCONSIN LEGISLATIVE COUNCIL

Terry C. Anderson, Director
Laura D. Rose, Deputy Director

TO: ASSEMBLY COMMITTEE ON ENERGY AND UTILITIES
SENATE COMMITTEE ON COMMERCE, UTILITIES, AND RAIL

FROM: David L. Lovell, Senior Analyst, and John Stolzenberg, Chief of Research Services

RE: 2007 Assembly Bill 207 and 2007 Senate Bill 107, Relating to Regulation of Cable Television and Video Service Providers; Overview of Major Provisions

DATE: March 26, 2007

This memorandum provides an overview, in outline format, of the major provisions of 2007 Assembly Bill 207 and 2007 Senate Bill 107, relating to regulation of cable television and video service providers. For a full-text summary of the entire bills, including summaries of applicable current law, see our memorandum to you of this date titled, *2007 Assembly Bill 207 and 2007 Senate Bill 107, Relating to Regulation of Cable Television and Video Service Providers; Background and Summary.*

AUTHORITY TO PROVIDE VIDEO SERVICE

- Replaces current municipal franchise system with state franchise
    - Franchise holder is termed "video service provider"
    - New entrant to market applies for franchise
    - Incumbent cable operator may:
        - Terminate municipal franchise and apply for state franchise; ***or***
        - Continue under municipal franchise as "interim cable operator"
    - Current municipal franchises may not be renewed upon expiration
    - New state franchises do not expire
    - Franchise is issued by Department of Financial Institutions (DFI) upon receipt of complete application

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- Video service provider must notify municipalities of:
    - Application for franchise that includes the municipality in the video franchise area
    - Intent to commence service (10-day advance notice)
- Municipalities must inform video service providers of:
    - The amount of franchise fee paid by any incumbent cable operator
    - The number of public, educational, and governmental (PEG) channels provided by any incumbent cable operator

VIDEO SERVICE PROVIDER FEE

- In general, video service provider must pay video service provider fee to each municipality in which it offers service
- The fee is the lesser of:
    - 5% of video service providers gross revenues; ***or***
    - The amount of franchise fee paid by incumbent cable operator
- Municipalities barred from imposing any other fee
- Enforcement of fee payments:
    - Municipality may inspect service provider's records once every three years
    - Must negotiate settlement of disputed amounts of fees
    - May sue only if good faith settlement discussions fail
        - Three-year time limit to commence suit
        - Neither party may recover costs of litigation
- Video service provider may itemize amount of fee on customers' bills

PEG CHANNELS

- In general, video service provider must provide municipalities PEG channel capacity
    - Three PEG channels for population of 50,000 or more
    - Two PEG channels for population under 50,000
    - Fewer if incumbent cable operator provided fewer

- Municipality fully responsible for PEG programming
    - Must produce and transmit to video service provider
    - May not charge fee to video service provider
- If not substantially utilized, video service provider may reprogram a PEG channel
    - Restore as PEG channel if municipality certifies it will substantially utilize it
    - "Substantially utilized" means:
        - At least 12 hours programming daily; and
        - At least 80% of programming is locally produced and not repeated
    - PEG channels must be available on any service tier viewed by more than 50% of subscribers
    - If PEG channel is reprogrammed because not substantially utilized and later restored to a PEG function, video service provider may provide on any service tier

PUBLIC RIGHTS-OF-WAY

- State franchise authorizes a video service provider to:
    - Occupy the public rights-of-way; and
    - Construct, operate, maintain, and repair a video service network to provide video service in the video franchise area
- If video service provider pays the required video service provider fee, municipality may not require the video service provider to pay
    - Compensation under s. 66.0425 (regulates occupation of public rights-of-way)
    - Any permit fee, encroachment fee, degradation fee, or any other fee
- Municipalities may not impose any fee or requirement on a video service provider relating to the construction of a video service network

CONSUMER PROTECTION

- Department of Agriculture, Trade and Consumer Protection (DATCP):
    - Retains authority to enforce service standards and disclosure requirements applicable to cable operators and to telecommunication providers offering a video service bundled with a telecommunications service

  - DATCP may amend these standards to apply to other types of video service providers

- Apparent continued statewide application of state privacy protections for cable service subscribers

- In a municipality with one video service provider, municipality ***may*** enforce only Federal Communications Commission (FCC) service standards relating to:

  - Provision of telephone access lines, customer service centers, and bill payment locations;

  - Performance standards for installations and responding to outages and service calls; and

  - Standards for issuing refund checks and service credits

- In a municipality with more than one video service provider, municipality, and state agencies ***may not*** enforce any state or local "customer service standards," (except for DATCP enforcement of regulations described above)

- Repeal of state service standards in the statutory "cable television subscriber rights"

ACCESS TO SERVICE ("BUILD-OUT")

- Build-out requirement applies only to "large telecommunications video service provider"

  - Effectively, this means AT&T Wisconsin

- Build-out requirement:

  - 25% of households no later than three years after service commenced

  - 50% of households no later than the later of:

    - Six years after service commenced

    - Two years after at least 30% of households with access have subscribed for six months

- Provider may obtain an extension or waiver under specified circumstances

DISCRIMINATION

- Discrimination based on income or race prohibited

- The following are defenses against allegation of discrimination based on income:

  - Three years after service commenced, 25% of households with access are low-income

  - Five years after service commenced, 30% of households with access are low-income

- Provider may obtain an extension or waiver under specified circumstances

REGULATION OF RATES

- Neither DFI nor a municipality may regulate rates ***if*** at least two unaffiliated video service providers provide service in a municipality

- Limitation applies regardless of whether any provider has sought a determination by the FCC regarding effective competition

RULE-MAKING LIMITED

- DFI prohibited from promulgating rules interpreting or establishing procedures related to its functions under the bills

ENFORCEMENT

- If any party fails to comply with the new law:
    - A municipality, cable operator, or video service provider may bring an action in circuit court
    - Court is directed to order compliance with the law
    - Bills are silent regarding recovery of damages
    - No party to a suit may recover its costs of prosecuting or defending the suit
- Department of Justice may enforce
    - No penalties specified in bills or current law
    - Statutory default penalty is a forfeiture of not more than $200

If you have questions regarding 2007 Assembly Bill 207 and 2007 Senate Bill 107 or video services in general, please contact either of us at the Legislative Council staff offices.

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WISCONSIN LEGISLATIVE COUNCIL

Terry C. Anderson, Director
Laura D. Rose, Deputy Director

TO: ASSEMBLY COMMITTEE ON ENERGY AND UTILITIES
SENATE COMMITTEE ON COMMERCE, UTILITIES, AND RAIL

FROM: David L. Lovell, Senior Analyst, and John Stolzenberg, Chief of Research Services

RE: Description of Draft Amendments to 2007 Assembly Bill 207 and 2007 Senate Bill 107, Relating to Regulation of Video Service Providers

DATE: April 16, 2007

This memorandum describes in full identical draft substitute amendments ("the substitute amendments") to 2007 Assembly Bill 207 and 2007 Senate Bill 107 ("the bills"), relating to regulation of video service providers, and two simple amendments to the substitute amendments, all of which were prepared at the direction of Chairs Montgomery and Plale. The memorandum describes only as much of the bills as is needed to describe the amendments. For an overview of the changes the substitute amendments make to the bills, in outline format, see our April 13, 2007 memorandum to you, *Overview of Draft Amendments to 2007 Assembly Bill 207 and 2007 Senate Bill 107, Relating to Regulation of Cable Television and Video Service Providers.* For a full description of the bills, see our March 26, 2007 memoranda to you, *2007 Assembly Bill 207 and 2007 Senate Bill 107, Relating to Regulation of Video Service Providers; Overview of Major Provisions*, and *2007 Assembly Bill 207 and 2007 Senate Bill 107, Relating to Regulation of Video Service Providers; Background and Summary.*

SUBSTITUTE AMENDMENTS: LRBs0061/1 AND LRBs0062/1[1]

Authority to Provide Video Service

Application for Franchise

The bills require that, in general, a person who intends to provide video service in this state must apply to the Department of Financial Institutions (DFI) for a franchise, and specify information and certifications that must be included in the application. Among other things, the applicant must certify

[1] LRBs0061/1 is an Assembly substitute amendment to Assembly Bill 207. LRBs0062/1 is a Senate substitute amendment to Senate Bill 107.

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that it is legally, financially, and technically qualified to provide video service. The substitute amendments add requirements that the application include a description of the service that the applicant will provide and that the application be accompanied by a $1,000 application fee. The bills require that a video service provider update its original application information if the information changes. The substitute amendments require that updates of most categories of information be accompanied by a $100 fee.

The bills require that the DFI notify the applicant whether the application is complete within 10 business days of receiving an application and issue a franchise to the applicant within 10 business days of receiving an application that it determines is complete. If the DFI fails to issue the franchise in the required time, it will be considered to have issued the franchise.

The substitute amendments extend the deadline for the DFI to notify the applicant whether the application is complete from 10 to 15 business days. Within 15 days of receiving a complete application, the DFI must determine whether the applicant is legally, financially, and technically qualified to provide the service. If it determines the applicant is qualified, it must issue the applicant a franchise; if it determines the applicant is not qualified, it must reject the application and state its reasons in writing.

In the case of an application by a telecommunications utility or a qualified cable operator, the DFI, in reviewing whether the applicant is qualified, must find that it is qualified. "Qualified cable operator" is defined as a cable operator that has provided cable service in this state for at least three years and has never had a franchise revoked by a municipality or an affiliate of such a cable operator, or a cable operator that, on the date of application, is one of the 10 largest video service providers in the United States or the parent company of such a cable operator.[2]

Revocation of Franchise

The bills do not include any provision for the revocation of a franchise.

The substitute amendments authorize the DFI to revoke a video service franchise if it determines that the video service provider has "willfully and knowingly repeatedly failed to substantially meet a material requirement" of the statewide video franchise statute created by the bills, unless the DFI has granted the video service operator a waiver from the requirement.[3] The DFI may not commence a revocation proceeding without first providing the video service provider with notice and an opportunity to cure any alleged violation. The substitute amendments specify that a revocation proceeding will be a contested case, a quasi-judicial proceeding that includes such elements as sworn testimony, cross-examination and the creation of a formal record that can be appealed to court.

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[2] This effectively exempts this category of applicants from DFI's review of its qualifications. It appears that all of the potential applicants identified in hearings on the bills are telecommunications utilities or qualified cable operators.

[3] The provisions of the bills that likely would be considered "material requirements" include those regarding PEG channels, video service provider fees, discrimination, and access to service. Since provisions of the bills relating to the use of public rights-of-way are not contained within the statewide video franchise statute itself, violations of these provisions would not be grounds for revocation of a franchise. Similarly, violations of consumer protection laws and customer service standards enforced by the Department of Agriculture, Trade and Consumer Protection (DATCP) would not be grounds for revocation, although it appears that violations of federal customer service standards, as enforced by municipalities, might be.

Definition of "Video Service Provider"

The bills define "video service provider" as a person who is issued a statewide video service franchise, including an affiliate, successor, or assign of such a person. The substitute amendments delete affiliates from this definition. This change is largely technical, made to prevent a broader meaning than intended in certain circumstances.

PEG Channels

In most cases, current municipal cable franchise agreements in Wisconsin require cable operators to provide channel capacity to municipalities for two or three public, educational, and governmental (PEG) channels, and the bills continue this requirement, in general. However, the bills specify that a video service provider may reprogram channel capacity it has provided for a PEG channel if the municipality does not substantially utilize the channel. The bills define "substantially utilize" as providing 12 hours or more of programming each calendar day, at least 80% of which is locally produced and not repeated.

The substitute amendments specify that a PEG channel is substantially utilized if the municipality provides 40 hours or more of programming each week, at least 60% of which is locally produced, irrespective of whether the programming is repeated.

Public Rights-Of-Way

Current Law

Under current law, a number of statutes govern the use of public rights-of-way by various entities. In particular, s. 66.0425, Stats., establishes the requirement that a person, other than public utilities and cooperatives that provide a utility service, obtain a municipal permit for the privilege to engage in construction in public rights-of-way, and addresses compensation to the municipality, performance bonds, liability, and third parties' interests. Also, s. 182.017, Stats., provides that the authority for public utilities and cooperatives that provide a utility service to occupy public rights-of-way is subject to a number of statutes and to "reasonable regulations made by any city, village or town through which the transmission lines or system may pass...."

The Bills

The bills provide that, notwithstanding s. 66.0425, municipalities may not impose any fee or requirement on a video service provider relating to the construction of a video service network. They also state that, as long as a video service provider pays the required video service provider fee, "the municipality may not require the video service provider to pay any compensation under s. 66.0425, or any permit fee, encroachment fee, degradation fee, or any other fee, for the occupation of or work within public rights-of-way." The bills are silent with regard to s. 182.017 and other statutes that address occupation and use of public rights-of-way.

In a separate provision, the bills state that "[a] video franchise issued by the [DFI] authorizes a video service provider to occupy the public rights-of-way and to construct, operate, maintain, and repair a video service network to provide video service in the video franchise area."

The Substitute Amendments

The substitute amendments retain the provisions of the bills that limit the authority of municipalities to impose fees and other restrictions on video service providers' use of public rights-of-way, but apply s. 182.017 to video service providers notwithstanding those provisions. The result is that, under the substitute amendments, s. 182.017 applies to, and allows municipalities to impose reasonable regulations on the occupation and use of public rights-of-way by video service providers. The substitute amendments make one exception to that, which is to prohibit municipalities from imposing permit fees or other charges on video service providers for use of public rights-of-way.

The substitute amendments require that, if a municipality requires a permit for the occupation or use of its public rights-of-way that the municipality must approve or deny a permit application within 60 days of receiving the application. If the municipality fails to meet this deadline, the permit is deemed to be approved by the municipality. If the municipality denies a permit application, it must present its reasons for the denial in writing.

The substitute amendments allows any entity whose occupation and use of public rights-of-way is subject to s. 182.017 (video service providers and others) to complain to the Public Service Commission (PSC) if it believes that a municipality has imposed an unreasonable regulation on its occupation and use of public right-of-way. The PSC must review such a complaint and, if it determines that the regulation is unreasonable, void the regulation.[4] The substitute amendments allow the PSC to assess the complaining party for the cost of the review.

Access To Service ("Build-Out")

"Large Telecommunications Video Service Provider"

The bills define "large telecommunications video service provider" (LTVSP) as a telecommunications video service provider (i.e., a video service provider that provides its service over telecommunications facilities) that has more than 500,000 basic local exchange access lines (i.e., residential customers) in this state. The only entity that meets this definition is AT&T, Inc.

The substitute amendments modify this definition to refer to a telecommunications video service provider that, ***on January 1, 2007, had*** 500,000 residential access lines. The result is that the term will include only AT&T even if another telecommunications video service provider grows to the point of having 500,000 residential access lines at some time in the future.

Build-Out Requirement

The bills require an LTVSP (AT&T) to provide access to its video service to the following percentages of households within its residential local exchange service area:

- Not less than 25% nor later than three years after the date on which the LTVSP began providing video service under its state franchise.

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[4] The PSC has, in ch. PSC 130, Wis. Adm. Code, promulgated standards for determining whether a municipality's regulations of a utility's use or occupation of the public right-of-way is unreasonable.

- Not less than 50% nor later than six years after the date on which the LTVSP began providing video service under its state franchise, or no later than two years after at least 30% of households with access to the LTVSP's video service subscribe to the service for six consecutive months, whichever occurs later.

The substitute amendments increase the first of these requirements from 25% to 35% of households and change the second requirement to apply after five years, rather than after six years.

Local Broadcast Stations

Under federal law, cable operators are required to carry the signal of local commercial television stations and qualified low power stations. The statute sets certain limits on this requirement, gives priority to the carriage of commercial stations over low power stations, and imposes requirements regarding the content to be carried, signal quality, and like matters.

The substitute amendments provide that broadcast stations may require noncable video service providers to carry their signals to the same extent that they may require cable operators to do so under current federal law. They require that the noncable video service provider transmit the signal without degradation, but allow it to do so by technology different than that used by the broadcast station. They also prohibit the noncable video service provider from discriminating among broadcast stations and programming providers and from deleting, changing, or altering a copyright identification that is part of a broadcast station's signal.

Rule-Making Limited

The bills specify that, notwithstanding the statute that gives an agency general authority to promulgate rules to interpret any statute it implements or enforces, the DFI may not promulgate rules interpreting the statewide video franchise statute created by the bills. The substitute amendments provide an exception to this prohibition, directing the DFI to promulgate rules for determining whether a video service provider, other than a telecommunications utility or qualified cable operator, is legally, financially, and technically qualified to provide video service.

Technical Corrections

The substitute amendments correct a number of minor technical errors in the bills and, in one instance, reword a provision to ensure the intended effect.

SIMPLE AMENDMENTS REGARDING VIDEO SERVICE PROVIDER FEES: LRBa0292/1 AND LRBa0296/1[5]

In most cases, current municipal cable franchise agreements in Wisconsin require cable operators to pay franchise fees to the municipality equal, in most cases, to 5% of the cable operator's gross receipts attributable to its provision of service in that municipality, and the bills continue this requirement, in general.

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[5] LRBa0292/1 is an Assembly amendment to the Assembly substitute amendment. LRBa0296/1 is a Senate amendment to the Senate substitute amendment.

The bills establish a definition of "gross receipts" for purposes of this fee. LRBa0292/1 and LRBa0296/1 modify this definition by: (a) deleting the limitation of the term to receipts paid "by subscribers residing within the municipality"; (b) adding to the definition revenues received from the provision of home shopping or similar programming and from advertising (with a formula for the allocation of revenues from advertising under regional or national contracts); and (c) other, technical changes.

The bills provide that, unless the parties agree otherwise, any action that is brought to enforce payment of a video service provider fee must be commenced within three years of the quarter to which the disputed amount relates. LRBa0292/1 and LRBa0296/1 extend the time limit to four years.

SIMPLE AMENDMENTS REGARDING CONSUMER PROTECTION: LRBa0294/2 AND LRBa0297/2[6]

Current s. 100.209, Stats., *Video Service Subscriber Rights*, establishes certain standards for cable service, which are enforced by the Department of Agriculture, Trade, and Consumer Protection (DATCP). In addition, under s. 100.209, the DATCP and municipalities may adopt and enforce rules or ordinances that supplement the requirements of the statute. The bills repeal this section.

LRBa0294/2 and LRBa0297/2 restore s. 100.209 and applies it to video service provided by "multichannel video providers," which is defined to include cable operators, video service providers, and "multichannel video programming providers," a term used in federal law which includes satellite video service providers. The amendments repeal the authority of municipalities to adopt ordinances that supplement the statutory standards.

LRBa0294/2 and LRBa0297/2 modify one of the standards in current s. 100.209. Under current law, when a subscriber notifies the cable operator of a service interruption that is not caused by the cable operator and that lasts for more than four hours in one day, the cable operator is required to give the subscriber credit for each hour that service was interrupted. The amendments modify this requirement to apply to service outages that last for more than 24 hours.

If you have questions regarding the bills or the amendments described in this memorandum, please contact us at the Legislative Council staff offices.

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[6] LRBa0294/2 is an Assembly amendment to the Assembly substitute amendment. LRBa0297/2 is a Senate amendment to the Senate substitute amendment.

WISCONSIN LEGISLATIVE COUNCIL

Terry C. Anderson, Director
Laura D. Rose, Deputy Director

TO: ASSEMBLY COMMITTEE ON ENERGY AND UTILITIES
SENATE COMMITTEE ON COMMERCE, UTILITIES, AND RAIL

FROM: John Stolzenberg, Chief of Research Services, and David L. Lovell, Senior Analyst

RE: Overview of Draft Amendments to 2007 Assembly Bill 207 and 2007 Senate Bill 107, Relating to Regulation of Cable Television and Video Service Providers

DATE: April 13, 2007

This memorandum provides an overview, in outline format, of the major provisions of draft amendments to 2007 Assembly Bill 207 and 2007 Senate Bill 107 requested by the chairs of your committees, Representative Phil Montgomery and Senator Jeff Plale. These bills relate to the regulation of cable television and video service providers. There are three amendments to each of the bills addressed in this memorandum, a substitute amendment and two simple amendments to the substitute amendment. The amendments to Assembly Bill 207 are identical to the amendments to Senate Bill 107.

For a full-text summary of the amendments, see our forthcoming memorandum to you dated April 16, 2007, titled, *Description of Draft Amendments to 2007 Assembly Bill 207 and 2007 Senate Bill 107, Relating to Regulation of Cable Television and Video Service Providers*. For a full-text summary of the entire bills, including summaries of applicable current law, see our memorandum to you dated March 26, 2007, titled, *2007 Assembly Bill 207 and 2007 Senate Bill 107, Relating to Regulation of Cable Television and Video Service Providers; Background and Summary.*

SUBSTITUTE AMENDMENTS [LRBs0061/1 AND LRBs0062/1[1]]

The overview of these substitute amendments identifies the changes made by these amendments to the bills.

[1] LRBs0061/1 is an Assembly substitute amendment to Assembly Bill 207. LRBs0062/1 is a Senate substitute amendment to Senate Bill 107.

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Authority to Provide Video Service

- Requires an applicant for a state video service franchise to pay a $1,000 application fee to the Department of Financial Institutions (DFI).
    - Requires a fee of $100 for most changes in application information.
- Extends DFI franchise application review periods from 10 to 15 business days.
- As a condition of granting a state video service franchise, requires DFI to determine that an applicant is legally, financially, and technically qualified to provide video service.
    - Exempts telecommunications utilities and "qualified cable operators" from this determination.
        - "Qualified cable operators" are generally either:
            - A cable operator that has provided cable service in Wisconsin for at least three years and never had a cable franchise revoked by a municipality; or
            - A cable operator that is one of the 10 largest video service providers in the United States based on total subscribers.
- Authorizes DFI to revoke a state video service franchise if the video service provider:
    - Has willfully and knowingly repeatedly failed to substantially meet a material requirement imposed under the video franchise statute; and
    - DFI has not authorized such noncompliance through a waiver.
- Deletes "affiliate" from the definition of "video service provider."

PEG Channels

- Modifies the "substantially utilized" test for a PEG channel to mean:
    - At least 40 hours of programming each week; and
    - At least 60% of programming is locally produced, irrespective of whether this local programming is repeated.

Public Rights-of-Way

- Applies the right-of-way law applicable to public utilities and comparable corporations (s. 182.017, Stats.) to video service providers and interim cable operators.
    - Authorizes a municipality to impose reasonable regulations on transmission lines and systems that pass through the municipality.

- Precludes from these regulations any fee for the occupation of or work within public rights-of-way by video service providers and interim cable operators.
- Authorizes the Public Service Commission to void a regulation if it determines that the regulation is unreasonable.[2]
- Requires a municipality to approve or deny any permit application required under these regulations within 60 days after receipt of the application.
    - If a municipality fails to act within this period, the permit shall be deemed granted.

Access to Service ("Build-Out")

- Modifies the build-out requirement to be:
    - 35% of households no later than three years after service commenced.
    - 50% of households no later than the later of:
        - Five years after service commenced.
        - Two years after at least 30% of households with access have subscribed for six months.
- Clarifies that the 500,000 residential access line requirement in the definition of "large telecommunications video service provider" is applied as of January 1, 2007.

Local Broadcast Stations "Must Carry" Requirements

- Authorizes a local broadcast station to impose "must carry" signal carriage and retransmission requirements on noncable video service providers comparable to requirements that it may impose on cable operators under federal law.
    - Requires a noncable video service provider to transmit these signals without degradation.
    - Prohibits a noncable video service provider from:
        - Discriminating among local broadcast stations or their programming providers.
        - Altering copyright identification.

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[2] The PSC's standards for unreasonable regulations for work by a public utility within a public right-of-way are in ch. PSC 130, Wis. Adm. Code.

Rule-Making Limited

- Requires limited DFI rule-making relating to whether an applicant for a state video service franchise is legally, financially and technically qualified to provide the service.

SIMPLE AMENDMENTS ON CONSUMER PROTECTION [LRBa0294/2 AND LRBa0297/2[3]]

- Applies the state consumer protection standards in the statutory "cable television subscriber rights," s. 100.209, to video service providers, interim cable operators, and "multichannel video programming distributors" (including satellite service providers), with the following changes:
    - Modifies the customer credit for service interruptions not caused by the service provider to apply after service has been interrupted for more than 24 hours.
    - Deletes the authority for a municipality to enact an ordinance that gives subscribers additional rights.

SIMPLE AMENDMENTS ON THE VIDEO SERVICE PROVIDER FEE [LRBa0292/1 AND LRBa0296/1[4]]

- Modifies the definition of "gross receipts," which is used to determine video service provider fees to:
    - Include revenues from the provision of advertising and home shopping or similar programming, and from maintenance charges.
        - Advertising revenues under a regional or national contract are based on prorating the revenues in proportion to the number of subscribers in the municipality compared to the number of subscribers reached under the contract.
- Modifies the period in which a municipality may sue over disputed amounts of fees following good faith settlement discussions to be a:
        - Four-year time limit to commence a suit.

If you have questions regarding any of these amendments to 2007 Assembly Bill 207 and 2007 Senate Bill 107 or video services in general, please contact either of us at the Legislative Council staff offices.

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[3] LRBa0294/2 is an Assembly amendment to Assembly Substitute Amendment __ (LRBs0061/1) to Assembly Bill 207. LRBa0297/2 is a Senate amendment to Senate Substitute Amendment __ (LRBs0062/1) to Senate Bill 107.

[4] LRBa0292/1 is an Assembly amendment to Assembly Substitute Amendment __ (LRBs0061/1) to Assembly Bill 207. LRBa0296/1 is a Senate amendment to Senate Substitute Amendment __ (LRBs0062/1) to Senate Bill 107.

WISCONSIN LEGISLATIVE COUNCIL

Terry C. Anderson, Director
Laura D. Rose, Deputy Director

TO: [redacted]

FROM: Larry Konopacki, Staff Attorney LAK

RE: State Termination of Cable Franchise Agreements Between a Municipality and a Cable Operator

DATE: February 16, 2007

Under current law, a town, village, or city is authorized to award cable franchises to cable operators to provide video programming within the municipality. [s. 66.0419 (3), Stats.] Some examples and summaries of franchise agreements that have been awarded by Wisconsin municipalities are available online.[1]

Interested parties have been advocating for the creation of a statewide cable franchising system that would eliminate the requirement that cable operators negotiate franchise agreements with each municipality in which the operator would like to provide video programming. You have asked whether it would be constitutional for the state to include a provision in a statewide franchising system to allow cable operators that are operating under existing franchise agreements with local units of government to terminate those agreements and opt to provide service under the statewide franchise.

This question has not been addressed by Wisconsin appellate courts, and it may implicate equitable considerations. These factors make it difficult to predict how a court would rule if faced with this question. With that in mind, it appears likely that a court would uphold a statute authorizing cable operators to terminate their existing franchises with municipalities under these circumstances.

Local units of government are instrumentalities of the state. Because of this, courts have allowed states to alter or terminate agreements that were entered into by local governments. Over 100 years ago, the U.S. Supreme Court ruled on whether a state Legislature could nullify certain provisions of a

[1] For example, the City of Stevens Point has a five-year agreement with Charter Cable Partners, L.L.C., running from 2002-2007: http://stevenspoint.com/tv/2002franchiseagreement.pdf. The City of Milwaukee has a 17-year agreement with Time Warner Cable running from 2000-2017: http://www.city.milwaukee.gov/FranchiseRenewalSumm1209.htm.

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contract between a city and a third party. The Court concluded that the Legislature could do so because the Legislature created the municipalities and directly controls how much authority they are afforded. [*Worcester v. Worcester Consolidated Street Railway Co.*, 196 U.S. 539, 548-49 (1905).] ("A municipal corporation is simply a political subdivision of the State, and exists by virtue of the exercise of the power of the State through its legislative department.")

The Wisconsin Supreme Court followed *Worcester* in a subsequent case about 50 years later:

> Counties, like other municipal corporations, are mere instrumentalities of the state, and statutes confer upon them their powers, prescribe their duties, and impose their liabilities. Because of this, the legislature may, with the consent of the other party, revoke any contract entered into by a county or other municipal corporation in performance of a governmental[2] function, and in so doing there is no violation of the constitutional prohibition against a state taking action to impair the obligation of a contract. This rule is stated in 37 Am. Jur., Municipal Corporations, pp. 699, 700, sec. 89, as follows: "A contract to which a municipal corporation is a party, relating to a public and governmental matter, may, however, be revoked by the legislature with the consent of the other party without thereby violating the right of the municipality." [*Douglas County v. Industrial Comm'n.*, 275 Wis. 309, 313-14, 81 N.W.2d 807 (1957) (internal citations omitted).]

As explained by the Wisconsin Supreme Court in the quote above, the other parties to a local franchise agreement must also consent to any action by the state which would alter or terminate the agreement. In the question that you have posed, a local franchise agreement would only be affected if the cable operator consents by choosing to terminate the agreement.

As long as legislation allowing cable operators to opt out of local franchise agreements and operate under a new statewide franchise system does not impair other contract rights such as the rights of any other parties to a franchise agreement or contract rights between the cable operator and its customers, creditors, or debtors, this state action would probably be constitutional.

If you have any questions, please feel free to contact me directly at the Legislative Council staff offices.

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[2] Courts formerly distinguished between a local government's "governmental" functions and "proprietary" functions with respect to claims of contract impairment, only allowing alteration or termination of contracts for the former function. However, the courts have since abandoned this distinction and now allow the state to alter or terminate local contracts related to either function. [*City of Charleston v. Public Serv. Comm'n*, 57 F.3d 385, 388-89 (4th Cir. 1995).]